



Lamoine Board of Appeals

606 Douglas Hwy
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(207) – 667-2242
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Minutes of September 8, 2008

Chair Griff Fenton called the meeting to order at 7:03 PM

Present were: Appeals Board members Reginald McDevitt, Jay Fowler, Hancock “Griff” Fenton, John Wuorinen, James Crotteau; Secretary Stu Marckoon, Appellant Wayne Wright, Steve Salsbury (Appellant representative), Planning Board members Michael Garrett and Michael Jordan, and member of the public Kathleen DeFusco

Minutes of August 11, 2008 – Mr. McDevitt moved to approve the minutes of August 21, 2008 as written. Chairman Fenton noted one minor change in reference from the Planning Board to the Appeals Board on page 3. Mr. Wuorinen 2nd the motion with the revision. **Vote in favor was 5-0.**

Request for Variance by Wayne Wright (Map 4 Lot 34)

Steve Salsbury summarized the site visit at the August 11, 2008 meeting, saying there were 4 water crossings on the proposed subdivision. He said the appellant has been back and forth between the Army Corps of Engineers (ACE) and the Department of Environmental Protection (DEP). He said both have jurisdiction over wetlands and vernal pool issues and both agencies have asked for minimal width for the subdivision road. He said they determined that width would be 9-foot travel lanes with 1-foot shoulders, or a 20-foot wide total.

Chairman Fenton asked Mr. Salsbury to explain the process the appellant has gone through. Mr. Salsbury said the Planning Board approved an 8-lot subdivision. He said he came back to the Planning Board after the DEP and ACE said they had to amend the subdivision because of wetlands and vernal pool issues. He said they chose to extend the road and add more lots which led them back to the Planning Board for 5 or 6 additional lots with a reduced road width. He said the width reduction was done to satisfy the concerns of DEP and ACE. He said the Planning Board did not have the jurisdiction to waive the road standard.

Chairman Fenton asked if a subdivision was once approved for that lot. Mr. Salsbury said it was, for 8-lots. Chairman Fenton asked what the real time line has been for the project. Mr. Salsbury said around 2-years. Chairman Fenton asked if Mr. Salsbury had met with Secretary Marckoon in regard to a de novo hearing. Mr. Salsbury said yes, and they went through the standards of the ordinance and agreed with all the standards except for the road width. He said that would be the only issue. Secretary Marckoon noted that the stipulation agreement is actually with the Planning Board – he only drafted the agreement.

Mr. Crotteau said it appears the 18-foot travel land width is sufficient for large vehicles. He asked what the criteria were in coming up with that width. Mr. Salsbury said the proposal came from engineer Andrew McCullough who wrote the summary for the variance request. Mr. Crotteau asked if that material was submitted. Mr. Salsbury said it was on page 51. He said they were trying to balance several jurisdictions with the

proposed width. Mr. Crotteau asked if Mr. Salsbury had to go round and round with the DEP and ACE. Mr. Salsbury replied that was correct for both agencies. Mr. Crotteau asked if the ACE saw the project as OK. Mr. Salsbury said the DEP and ACE issue joint permits. Mr. Crotteau asked if they talked about the conformity with the local ordinance. Mr. Salsbury said the ACE and DEP asked the appellant to come to the Planning Board to see if they could get approval for a less wide road. Mr. Crotteau said that was what he wanted to hear. Mr. Salsbury said DEP and ACE were aware of the ordinance standards. Mr. Crotteau asked if there was any discussion about having a less wide road only at the wetlands crossings. Mr. Salsbury said that was discussed only marginally, and if the road were narrow in 4-spots, it would sort of defeat the purpose of the minimum width.

Chairman Fenton said he did not see the 20-foot width listed on page 51. Mr. Salsbury said that was shown on page 50 with the typical cross section.

Planning Board member Michael Garrett said he was sorry he was not able to attend the previous Appeals Board meeting. He said the minutes from that meeting reference setting precedent with Old Schoolhouse Lane in regard to road width. He said in 2002 the minimum road width in the Building and Land Use Ordinance was 34-feet (two 9-foot travel lanes, and two 8-foot shoulders). He said the Planning Board agreed at that time it would be like requiring Route 66 to be built to serve a rural subdivision and they did waive that width requirement. He said the Planning Board spent a lot of time attempting to establish a rational basis for a subdivision road width. He said the criteria was that it be wide enough to allow two fire trucks to pass without hitting mirrors. He said there have been no waivers of the requirement since 2005. He said there is a significant difference in waiving a 34-foot road width compared to a 24-foot road width.

Mr. Garrett said at no time during the Planning Board deliberations was there ever a discussion about the road being substandard and the width causing the developer a hardship. He said he pointed that out at the Planning Board meeting. He said Mr. Salsbury was non-committal at that time. He said there was no discussion initiated by the developer in regard to a hardship either at the public hearing or during the review standards vote. He said he found it hard to believe that the appellant was here with a hardship. He said the Planning Board did have authority granted in 2002 to waive the road width standard. He said either Mr. Salsbury was not aware of that or he designed the proposal to hope it would slide through unnoticed.

Chairman Fenton said he wanted to open the discussion and that he's troubled when an ordinance that creates a situation where a property does not meet a standard. He said he's concerned that when writing ordinances, officials should have some discretion in how to administer it. He gave an example would either grant latitude to the Code Enforcement Officer if a proposal is acceptable, or making an appeal available. He said that might be a philosophical question about what the better approval route might be. Mr. Garrett said that could give an undue burden to the CEO. He said sometimes the CEO has not served the town particularly well.

Mr. Salsbury said he disagreed with much of what Mr. Garrett had said. He said the Planning Board does not have authority to deviate from the ordinance standards, and



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that the Appeals Board granted the Old Schoolhouse Road width waiver. Mr. Garrett said the Planning Board could grant a waiver. Mr. Salsbury said the Planning Board can only grant a waiver on the submission information, not the review criteria.

Mr. Fowler said he was present during the Old Schoolhouse Lane hearings. He said he did not understand why that was before the Appeals Board when the Planning Board could waive the width. Mr. Garrett said the Planning Board knew the 34-foot wide road was outrageous.

Chairman Fenton said for the Board of Appeals to grant a variance, there needs to be a hardship. Mr. Salsbury said they've spent a couple of years on this project and the ACE and DEP has asked them to make a minimal impact with the road. He said there are sensitive environmental areas which they cannot avoid crossing. He said the bulk of the wetlands are in the front of the lot. Chairman Fenton said it was helpful to see the property during the site visit.

Appellant Wayne Wright said because of ACE they lost a huge portion of buildable land and lots of money. He said they're trying to satisfy the town, the DEP and ACE. He said he understands that the town has standards, but they're trying to satisfy the road width issue with many others.

Mr. Wuorinen asked if the appellants had discussed increasing the width to the Planning Board precedent. Mr. Salsbury asked to what precedent he referred. Mr. Wuorinen said 24-feet. He asked if they had discussed that specific width with ACE/DEP. Mr. Salsbury said they had and both agencies said they would like to see a minimum impact. He said ACE/DEP felt 16-feet to 18-feet was not unreasonable based on the impact to the wetlands. Mr. Wuorinen asked if the DEP/ACE looked at the amount of wetland crossed as opposed to the amount of impervious surface.

Chairman Fenton asked about lost revenues. Mr. Salsbury said the appellant gave up 7-acres as compensation over the vernal pool issue. Mr. Wuorinen said financial loss is not a factor. Mr. Salsbury said the hardship is the wetlands that are there.

Mr. Fowler asked if the 24-foot wide road is mentioned in the ordinance. Mr. Garrett said that was adopted in the ordinance in April 2005. Mr. Fowler said he had not been aware of that.

Stipulations – Chairman Fenton noted the Board received a set of stipulations in the mail. He said the one item to discuss appears to be the road width. He asked Mr. Salsbury about a report he submitted about other road widths around town. Mr. Salsbury said he tried to focus on roads in subdivisions of record. He said those subdivisions have been around for a while and show they can handle the capacity of traffic for the lots they serve. He said some subdivisions are much larger than that proposed by Mr. Wright. Chairman Fenton asked about the average width. Mr. Salsbury said the average full width, including shoulders, was 19 ½ feet. Chairman Fenton asked if the variance would be for two 9-foot travel lanes and two 1-foot shoulders Mr. Salsbury said that would be correct.

Chairman Fenton said he would like to proceed to the findings of fact. He said the process needs to be defined and suggested it would be great to discuss the one issue, if the stipulations are approved. Mr. Crotteau said whatever the Board does will have an impact. He said if the Board does something to approve the variance; it would be clear there are unique aspects that do not apply to other subdivision proposals. He said it has to be more than just saying it "looks good". He said the town has an ordinance with a minimum width. He said the Board needs to be clear there is something special and unique. Mr. Wuorinen said he supports that. Mr. Fowler said he didn't see any problem with the road as it's laid out, but he did not realize what the minimum width requirement was. He said the Board must be sure that any decision is made for the right reason. Mr. Crotteau said if other roads are the same width, that is not the issue. Mr. Fowler said if this is approved now, the Board has to be careful about what happens in the future.

Chairman Fenton said looking on the map, one cannot reach the usable portion of the property without going through the wetlands at the beginning of the lot. He said that's what the Board is dealing with, along with the impact of vernal pools. He said he found discussion about the beaver dam by the ACE an interesting read. He said he knows when citizens enact a law, the Planning Board must uphold it. He said anything the Appeals Board does must be done carefully, or it might be going against what the voters approved. He said he does not take that lightly. He said the Board must look out for the best interest of the Town. He said the findings of fact must be written carefully. He said the conclusion must be so that it doesn't pertain to anywhere else.

Chairman Fenton asked what the feeling was of the board. Mr. Wuorinen asked if the DEP/ACE established the 20-foot width exactly. Mr. Salsbury said the DEP/ACE said they preferred 16-feet to 18-feet wide. He said their engineer though 20-feet was more reasonable, and ACE accepted the 20-foot width. Mr. Wuorinen said that came from the point of view of environmental impact. Mr. Fowler said he agreed that 20-feet would sustain the traffic. Mr. McDevitt asked if the Planning Board had approved a 24-foot road in the previous subdivision plan, and if the DEP approved the 20-foot road. Mr. Salsbury said that was correct. Mr. McDevitt said the reason the ACE didn't want 2-more feet of width on either side was because of the vernal pools. He said it's all part of the Clean Water Act. He said he went down twice to the road and could not find a drop of water. He said the only reason for that decision was because some bureaucracy wanted to get their hands into the decision. He said it's getting to the point where nobody can do anything with their land. He said it gets under his skin. He said the hassle seems to be over two feet. He asked what harm that is going to do when the Union River and the Penobscot River are running filth all the time. He said he was going through a similar thing personally.

Mr. Wuorinen said it's not the Board's responsibility to interpret the validity of environmental requirements. There was a brief discussion about vernal pools and federal and state environmental laws.

Findings of Fact – Mr. Wuorinen said the first thing ought to be to refer to town rules for grounds for a variance. Secretary Marckoon said there are two ordinances at play – the Building and Land Use Ordinance (BLUO) refers to the road width; the Site Plan Review (SPR) then follows, requiring compliance with the BLUO.



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Mr. Wuorinen read the criteria in regard to a variance:

1. *The land in question cannot yield a reasonable return unless the variance is granted.*

Mr. Crotteau said it's clear, looking at a map of the property, that the issue is that you cannot do anything with it without a road which must cross wetlands. Mr. Salsbury said that is correct. He said if the wetlands were located in back of the property, one could leave them alone. Mr. Crotteau said the land is unique in that it has vernal pools present. He said that is special to that piece of property. Mr. Wuorinen said the question is what reasonable return is. Mr. Fowler said if you cannot get to the usable part of the property, there is no return. Chairman Fenton said they could give up 3-lots and have the road go elsewhere, that would be one thing, but they cannot get to the land anywhere else. Mr. Crotteau said they cannot develop the property unless they cross a wetland.

Secretary Marckoon suggested the Board should vote on the individual criteria.

Mr. Wuorinen moved to find that the land could not yield a reasonable return unless the variance is granted. Mr. Fowler 2nd.

Mr. McDevitt asked to have the motion re-read. Mr. Fenton restated the motion and said the interpretation is that if they cannot get to the property, there is no return possible. Mr. Wuorinen said return does not mean a landowner can profit to the maximum amount. Mr. Crotteau said there has to be some economic return, but not top dollar. He said the question of whether they need a road to develop the land is clearly yes. He said the other question is whether if the board says no, and the appellant goes back to DEP/ACE and they say OK to the 24-foot road, could they return to the town and have the ordinance upheld. He said he understands the appellant talked with the DEP, but it's not clear that the DEP would not approve a 24-foot road. Mr. Salsbury said that's what they would face if the Appeals Board turned down the variance request.

Chairman Fenton said the DEP/ACE requested minimal impact. Mr. Salsbury said the width issue was all that was discussed, and the agencies would only let them apply for a 20-foot road. Mr. Wuorinen asked how the DEP/ACE told them they would not allow a 24-foot road. Mr. Salsbury said they had to negotiate for a 20-foot road. He said the DEP/ACE would not discuss a 24-foot road unless there were no other alternatives. Chairman Fenton asked if it was correct that the DEP/ACE gave the appellants a choice of a 16-to-18 foot road and the appellants got them to agree to a 20-foot road, and that it is likely the DEP/ACE would laugh at a 24-foot road proposal.

Mr. Wuorinen said what he's hearing is that based on being turned down by the Appeals Board, the appellants could go back to ACE/DEP, but it's not clear what those agencies would do. Mr. Fowler said the ACE/DEP did not want to go over 20-feet wide. Mr. Salsbury said they've had lots of meetings with ACE/DEP over the past two years.

Vote was 2 in favor, 3 opposed (McDevitt, Wuorinen, Crotteau opposed)

Chairman Fenton said based on the vote on the first criterion there is no way this can be approved. Mr. Wuorinen said he would move to stop the hearing at this point. Chairman Fenton said the Board has determined the appeal is not approved, and he believes that the reasons are spelled out in the Planning Board decision and ordinance. Mr. Fowler asked if the appellants could go back to the ACE/DEP and try for a 24-foot wide road. Mr. Croteau said his feeling is that if they got to the ACE/DEP and are told not to a 24-foot wide proposal, he would feel differently about the reasonable return question.

Mr. Garrett said if the DEP says no, it's a "no brainer". Chairman Fenton said he was under the impression the appellant had done this. Mr. Garrett said it should be seen in writing. Mr. Croteau said it's a big deal to not follow the town ordinance. He said he wants to see clear evidence from the DEP/ACE, and if they see that, the situation is not the appellant's fault.

Mr. Garrett asked if the DEP could acknowledge that the local ordinance exists. Mr. Croteau said the appellant could ask. Mr. Salisbury asked if the Board could hold open the meeting for 30-days to see if the appellants could obtain requested information from the DEP/ACE.

Chairman Fenton said the Board could continue the meeting to a time certain. Mr. Salisbury said he should be able to get an answer by then. Chairman Fenton said if that's the case the Board did not vote on the 3-other criteria. He asked if those questions should be resolved now. Mr. Croteau said he had no problem with the other questions if the DEP/ACE will not allow a 24-foot wide road. Mr. Wuorinen said he agreed, as did Mr. McDevitt and Mr. Fowler.

Chairman Fenton said the meeting would tentatively be scheduled to continue on Monday, October 20, 2008 at 7:00 PM. Secretary Marckoon said he would try to schedule the meeting so as not to conflict with the Budget Committee.

Secretary Marckoon handed out scheduling calendars to the Board members for 2009.

There being no further business to conduct, the meeting adjourned at 8:07 PM

Respectfully submitted,

Stu Marckoon, Secretary

****Subsequent to adjournment, Chairman Fenton discovered a conflict and the next meeting will instead be held Monday, October 13, 2008 at 7PM at the Lamoine Town Hall.